Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor

HIGH COURT (PENANG) — CIVIL SUIT NO 375 OF 1981
EDGAR JOSEPH JR J
15 AUGUST 1992

Tort *— Damages — General and exemplary damages — Diminution in value of landlocked land — Measure of damages*

Land Law *— Easement — Right of way — Right not registered — Transactions relating to alienated land or any interest therein not affected — Application of equitable principles — National Land Code 1965 ss 206(3) & 284*

This is the sequel to the judgment reported in [1989] 2 MLJ 202. In that case, the court had decided that the defendants were liable to the plaintiffs for trespass, nuisance and injury to the plaintiffs' land — lots 48 and 55. The plaintiffs appealed to the Supreme Court against certain of the reliefs granted by the court. When the appeal came up for hearing, the Supreme Court stayed the hearing and ordered the defendants to carry into effect certain terms in the High Court order failing which the plaintiffs were entitled to apply to the court for further orders including an order that the damages awarded be reassessed. It was not disputed that the defendants had attempted to comply with the terms of the Supreme Court order. This was done by building an access road to the plaintiffs' land (at lot 48) measuring some six ft wide. There was evidence that the relevant authorities had required the access road to be at least 15ft wide. The judge found that due to topographical constraints, it would not be possible for the defendants to construct a proper access road to the plaintiffs' land. The defendants have also failed to register the access road linking the defendants' land and the plaintiffs' land at lot 55 as an easement in accordance with the provisions of the National Land Code 1965 ('the Code'). The question before the court is whether the damages awarded to the plaintiffs in the earlier case should be reassessed in light of the circumstances of the present case.

Held, allowing the plaintiffs' application:

(1) Lot 48, although not technically landlocked, should be treated for all practical purposes as though it were landlocked. It would be both right and fair to reassess the compensatory damages awarded for the diminution in value of the land and the exemplary damages awarded. The plaintiffs never had any serious or genuine intention of developing lot 48.

(2) Therefore, the compensatory damages for diminution of the value of lot 48 is assessed by taking its present fair market value had it not been injured by the acts of trespass and nuisance and subtracting from that its present market value. The safest guide to determine the fair market value is evidence of sales of similar land in the neighbourhood, due allowance being made for all relevant

circumstances. Accordingly, general damages for diminution in value of lot 48 was assessed at RM636,386 and that award was made in substitution for the award of compensatory damages in the earlier judgment.

(3) As for the plaintiffs' claim for exemplary damages in respect of lot 48, having regard to the increase in the award of compensatory damages for diminution in value, it was just to make a corresponding increase in the award of exemplary damages from RM25,000 to RM155,000.

(4) For lot 55, all the four requirements for the creation of easements were satisfied which were: there were dominant and servient land; the easement accommodated the dominant land; the dominant and servient landowners were different persons; and the right granted was capable of forming the subject matter of a grant. The effect of s 284 of the Code is that an easement can only be created by an express grant followed by the registration of an instrument in the prescribed form. In this case, this was not done by the defendants. However, s 206(3) provides that the provisions of the Code requiring dealings to be effected in the statutorily prescribed manner shall not affect the contractual operation of any transaction relating to alienated land or any interest therein. This provides statutory authority for the liberal application of equity whenever there is a basis for that.

(5) As for the plaintiffs' claim for exemplary damages in respect of lot 55, having increased the award under this head for lot 48, a corresponding increase in respect of lot 55 from RM50,000 to RM310,000 was made.

[Bahasa Malaysia summary

Ini adalah sambungan kepada kes yang telah dilaporkan di dalam [1989] 2 MLJ 202. Di dalam kes itu, mahkamah telah memutuskan bahawa defendan bertanggungjawab kepada plaintif untuk pencerobohan, kacau ganggu dan kerosakan kepada tanah plaintif — lot 48 dan lot 55. Plaintif telah membuat rayuan kepada Mahkamah Agung mengenai beberapa daripada relif yang diperintahkan oleh Mahkamah Tinggi. Apabila rayuan didengar, Mahkamah Agung telah menggantungkan pendengaran rayuan dan memerintahkan supaya defendan melaksanakan beberapa daripada terma di dalam perintah Mahkamah Tinggi itu, dan jika defendan gagal berbuat demikian, plaintif berhak memohon kepada mahkamah untuk perintah lanjutan termasuk perintah supaya gantirugi yang telah diberi dinilaikan semula. Adalah tidak dipertikaikan bahawa defendan telah membuat percubaan untuk mengikuti terma perintah Mahkamah Agung. Ini dilakukan dengan membina sebatang jalan masuk ke tanah plaintif (lot 48) yang berukuran lebih kurang enam kaki lebar. Terdapat bukti bahawa pihak berkuasa yang relevan mengkehendaki supaya jalan masuk itu berukuran sekurang-kurangnya 15 kaki lebar. Hakim yang arif telah mendapati bahawa disebabkan oleh had topografik, adalah mustahil

untuk defendan membina jalan masuk yang sesuai kepada tanah plaintif. Defendan juga telah gagal mendaftarkan jalan masuk yang menghubungkan tanah defendan ke tanah plaintif di lot 55 sebagai isemen mengikut peruntukan Kanun Tanah Negara 1965 ('Kanan itu'). Soalan untuk diputuskan oleh mahkamah adalah sama ada gantirugi yang telah diberikan kepada plaintif dalam kes yang terdahulu patut dinilaikan semula memandangkan keadaan di dalam kes ini.

Diputuskan, membenarkan permohonan plaintiff:

(1) Lot 48, walaupun tidak terkurung dari segi teknikal, patut disifatkan untuk segala tujuan seolah-olah ianya terkurung. Adalah betul dan adil untuk menilai semula gantirugi pampasan yang telah diberikan untuk kejatuhan nilai tanah tersebut dan gantirugi teladan yang diberikan.

(2) Plaintif tidak pernah serius atau benar-benar bertujuan untuk membangunkan lot 48. Oleh itu, gantirugi pampasan untuk kejatuhan nilai lot 48 dinilaikan dengan mengambil nilai pasaran yang adil pada masa ini jika ianya tidak dirosakkan oleh kelakuan pencerobohan dan kacau ganggu dan menolakkan dari itu nilai pasarannya sekarang. Petunjuk terbaik untuk mendapatkan nilai pasaran yang adil adalah bukti penjualan tanah yang sama di persekitaran, pertimbangan diberikan untuk kesemua keadaan yang relevan. Oleh itu, gantirugi umum untuk kejatuhan nilai lot 48 telah dinilaikan pada RM636,386 dan award itu telah dibuat mengganti award gantirugi pampasan di dalam penghakiman yang terdahulu.

(3) Berkenaan tentang tuntutan plaintif untuk gantirugi teladan bagi lot 48, memandangkan kenaikan dalam award untuk gantirugi pampasan bagi kejatuhan nilai, adalah adil untuk membuat suatu kenaikan yang sama dalam award untuk gantirugi teladan dari RM25,000 kepada RM155,000.

(4) Untuk lot 55, keempat-empat syarat untuk kewujudan isemen telah dipenuhi, iaitu: terdapat tanah dominan dan servien; isemen tersebut mesti menampung tanah dominan; pemilik tanah dominan dan servien berlainan; dan hak yang diberikan boleh dijadikan subjek untuk suatu pemberian. Kesan s 284 Kanun itu adalah bahawa suatu isemen hanya boleh diwujudkan dengan pemberian nyata diikuti dengan pendaftaran suatu suratcara dalam bentuk yang diperuntukkan. Di dalam kes ini, defendan tidak berbuat demikian. Tetapi, s 206(3) memperuntukkan bahawa peruntukkan Kanun itu yang memerlukan supaya urusan dilaksanakan dalam bentuk statutori yang diperuntukkan tidak akan menjejas operasi kontrak sebarang transaksi mengenai tanah berimilik atau sebarang kepentingan di dalamnya. Ini memberikan kuasa statutori untuk pemakaian equiti yang liberal di mana terdapat asas untuknya.

(5) Berkenaan dengan tuntutan plaintif untuk gantirugi teladan bagi lot 55, setelah menaikkan award untuk gantirugi teladan bagi lot 48, suatu kenaikan yang sama telah dibuat untuk lot 55, dari RM50,000 kepada RM310,000.]

Notes

For a case on the non-registration of easements of right of way, see 8 *Mallal's Digest* (4th Ed) para 1309.

Cases referred to

1 *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202
2 *Bracewell v Appleby* [1975] Ch 408 (refd)
3 *Carr-Saunders v Dick McNeil Associates Ltd & Ors* [1986] 2 All ER 888; [1986] 1 WLR 922 (refd)
4 *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 (refd)
5 *Kailas Chandra v Secretary of State* 17 Cal LJ 35 (refd)
6 *Yong Tong Hong v Siew Soon Wah & Ors* [1971] 2 MLJ 105 (refd)
7 *Mercantile Bank Ltd v The Official Assignee of the Property of How Han Teh* [1969] 2 MLJ 196 (refd)
8 *Inter-Continental Mining Co Sdn Bhd v Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145 (refd)
9 *Margaret Chua v Ho Swee Kiew & Ors* [1961] MLJ 173 (refd)
10 *Mayor of Wellington v Public Trustee* [1921] NZLR 1086 (refd)
11 *United Malayan Banking Corp Bhd & Anor v Pemungut Hasil Tanah Kota Tinggi* [1984] 2 MLJ 87 (distd)

Legislation referred to

National Land Code 1965 s 206(3)

AJ Yeoh (*Shearn Delamore & Co* and *Drew & Napier*) for the plaintiffs.
Anthony Fernandez (*Anthony Fernandez & Partners*) for the defendants.

Edgar Joseph Jr J: These proceedings are a sequel to the appeal from my judgment dated 7 November 1988, reported under the name of *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor*[1] and arose in this way:

When the appeal by the plaintiffs came on for hearing before the Supreme Court on August 1990, the hearing thereof did not proceed and, indeed, the Supreme Court stayed the same, pending compliance by the defendants/respondents with certain requirements specified in my judgment which were relevant to certain of the reliefs granted, within three months from that date, more particularly, these requirements related to the question of access from lots 48 and 55, Batu Ferringhi, Section 2, Penang, to the public highway known as the Batu Ferringhi Road.

For a better understanding of the issues which arise for consideration in these proceedings I should, perhaps, refer to certain background facts:

I had, by my judgment, held (at p 218 col 1G) that I was satisfied that the plaintiffs had succeeded in establishing liability in tort against both the defendants in so far as their claims in general damages for trespass, nuisance and injury to lots 48 and 55 were concerned, resulting in obstruction of access therefrom to the public highway known as the Batu Ferringhi Road.

I had further held (at p 220 col 2A and B) that upon a proper construction of the relevant sale and purchase agreement, the sale of the lots, the subject matter thereof, was subject to a right of way affording access from lots 48 and 55 to the public highway known as the Batu Ferringhi Road.

I had also held (at p 221 col 1D) that the defendant company was estopped by its conduct and the conduct of its managing director from denying the plaintiffs a right of access from lots 48 and 55 to the public highway known as the Batu Ferringhi Road.

The reliefs I had granted the plaintiffs, so far as material to the present proceedings, were contained in paras 2 and 7 of the summary of the reliefs in my judgment (at pp 245 col 2A–I and 246 col 1I–2E) and ran as follows:

(2)(a) Against the defendant company, subject to planning permission being obtained (if necessary), a mandatory injunction requiring it to construct, as soon as reasonably possible, a single metalled access road of about 12ft in width, affording access from lot 48 to the public highway known as Batu Ferringhi Road, in accordance or substantially in accordance with the plan D75, tendered on its behalf at the trial and complying with local authority specifications.

(b) To give legal effect to this order, I would grant a further mandatory injunction requiring the defendant company or its successors in title, as the case may be, to execute the prescribed Form 17A under s 286(1) of the [National Land Code 1965 ('the Code')] and to present the same for registration, thus creating an easement of way; in particular, a right of carriageway within the meaning of s 288(b) of the code in perpetuity over the existing road on lot 39 (the servient land) defined in the 1935 survey map (p 49 exh AB) in accordance with or substantially in accordance with the plan exh D75 tendered on its behalf at the trial and so affording access from lot 48 (the dominant land) to the public highway known as the Batu Ferringhi Road, in favour of the plaintiffs and their successors in titles, within two months from date of the decision herein, or in the event of planning permission being required, then within one month from the date of the grant of such permission, failing which the senior assistant registrar of this court to do so.

(c) Upon presentation of the duly executed instrument in Form 17A aforesaid the proper registration authority shall register the same as soon as reasonably possible.

(d) There will also be the following consequential orders:

(i) the defendant company or its successors in title shall forthwith from date of decision herein enquire in writing from the relevant authorities if planning permission as aforesaid is required; and, if so, to apply forthwith for the same;

(ii) in the event of planning permission being granted but subject to conditions, the defendant company or its successors in title, as the case may be, shall comply with the same as soon as reasonably possible; and shall be responsible for the payment of all prescribed fees or deposits (if any) in connection therewith;

(iii) the defendant company or its successors in title, as the case may be, shall promptly provide the plaintiffs or their solicitors with copies of all correspondences passing between them and the relevant authorities and also of any application for planning permission;

(iv) in the event of the defendant company or its successors in title, as the case may be, failing to enquire or to apply or to comply with any condition as aforesaid, then the plaintiffs or their successors in title, as the case may be, shall be at liberty to do so, in which case, they shall be entitled to recoup all expenses reasonably incurred in connection therewith and the same shall be recoverable as a debt due from the defendant company or its successors in title to the plaintiffs or their successors in title, as the case may be;

(e) However, in the event of planning permission for the access aforesaid being required and not being forthcoming or in the event of the rights of third parties having intervened or in the event of there being some legal or other impediment to the creation of such easement as aforesaid, then the parties shall be at liberty to apply to court to enable me to consider what further or other orders I should make in substitution for or in addition to the orders aforesaid, in which event, perhaps, the damages awarded for diminution in value to lot 48 may have to be reassessed, having regard to the circumstances of the case.

...

(7)(a) Against the defendant company, a mandatory injunction requiring it or its successors in title to execute the prescribed Form 17A under s 286 (1) of the Code and to present the same for registration thus creating an easement of way, in particular, a right of carriageway within the meaning of s 288 (b) of the Code in perpetuity over its 40ft wide main access road on lot 39 (the servient land) and so affording access from lot 55 (the dominant land) to the public highway known as the Batu Ferringhi Road, in favour of the plaintiffs or their successors in title, within one month from the date of the decision herein, failing which the senior assistant registrar of this court to do so *provided always* that this order does not have the effect of interfering with the rights of third parties which might have intervened.

(b) Upon presentation of the duly executed instrument in Form 17A, the proper registering authority shall register the same as soon as reasonably possible.

(c) However, in the event of the rights of third parties having intervened, or if there is some legal or other impediment to the creation of such an easement, then the parties shall be at liberty to apply to court to enable me to consider what further or other orders I should make in substitution therefor including, perhaps, an order for the award of damages for diminution in value to lot 55, having regard to the circumstances of the case. (Emphasis provided.)

In the event, neither defendant appealed from my judgment but the plaintiffs did — against those parts of my judgment regarding certain of the reliefs granted.

When, therefore, the appeal came on for hearing on 1 August 1990, the Supreme Court, as I have already said, stayed the hearing thereof but went on to make certain orders of a preliminary nature; specifically, the orders it made were these:

It is ordered that the appeal be stayed and that the respondents do forthwith carry into effect paras 2 and 7 of the order of the High Court dated 7 November 1988 pertaining to access to lots no 48 and 55, Batu Ferringhi, Section 2, Penang within three (3) months of the order herein failing which the appellants do apply

to the learned judge pursuant to paras 2(e) and 7(c) of the said order of the High Court and it is further ordered that the costs of the proceedings be costs in the cause.

The events so far as relevant to the present proceedings, between the date of the order of the Supreme Court and the commencement of the present proceedings before me were these:

There is no dispute that prior to the filing of the present proceedings, the defendant company had attempted to comply with the order of the Supreme Court. What the defendant company had done was to construct a single metalled road purportedly in compliance with exh D75 being its proposed plan for the 12ft access road from lot 48 to the public highway known as the Batu Ferringhi Road, which it had tendered at the trial.

There is also no dispute — and I so find — that the width of the metalled access road at the entrance to lot 524 measured from the boundary peg at the north western corner of the sub-divided lot 526 to the edge of the retaining wall between lots 524 and 42 measures only 6.6ft (see exh A1).

Moreover, there are two further criticisms which could be levelled against this metalled access road, namely:

(a) part of it, that is to say, the portion at the entrance to lot 524, does in fact encroach into the sub-divided lot 526; and

(b) part of it is constructed over the top of the retaining wall between lots 524 and 42 and over the drain reserve, contrary to the express requirements of the defendant company's final sub-division plan, being exh C.

There is also no dispute that although required by para 2(d)(i) of my order to enquire in writing from the relevant authorities if planning permission was required for the construction of the access road, the defendant company has done nothing of the sort.

I would interpolate, that other evidence material to this part of the case is a letter from the Majlis Perbandaran Pulau Pinang dated 9 May 1991 addressed to Ms Shearn Delamore & Co, the solicitors for the plaintiffs, which confirms that the width of the access road is only 6.6ft although the minimum width required must be 15ft. Translated into English the letter reads:

Ruj tuan: SD 3570/fc
Tarikh: 9 Mei 1991

Shearn Delamore & Co and Drew & Napier,
Advocates and Solicitors,
6th Floor Wisma Penang Garden,
No 42, Jalan Sultan Ahmad Shah,
10050 Pulau Pinang.

Tuan,

Penang High Court Suit No 375/81

I am directed to refer to your letter dated 10 May 1991 regarding the above matter and the surveyor's plans submitted, and confirm that the width of the access road to lot 48, Sec 2, Batu Ferringhi is only six feet six inches.

2 Please note that if you propose to develop the land, the required width of the access road should be at least 15ft. A

Sekian harap maklum.
'Berkhidmat Untuk Negara.'
Saya yang menurut perintah,
tt B
(Mohd Razali bin Mahyuddin)
Pengarah Bangunan-Bangunan
Majlis Perbandaran Pulau Pinang.

Indeed, a much earlier letter from the Jabatan Kerja Raya to the defendant company dated 10 July 1989 stipulates for a minimum width of 40ft. C Translated into English it reads:

Ruj Kami: (12) dlm PKR PP A/17/14/418A
Tarikh: 10 Julai 1989

Mount Pleasure Corporation Sdn Bhd D
34 Jalan Sultan Ahmad Shah,
Pulau Pinang

(up: KW Chow)

Tuan, E

Proposed 12ft (3650) wide access road from lot 39 to lot 48, Batu Feringghi Road, Penang For Mount Pleasure Corp Sdn Bhd

With reference to the above matter and your letter ref MPC/GW/89/0138 dated 9 June 1989, the Jawatankuasa Pembangunan Tepi Jalan JKR at its meeting on 24 June 1989, had discussed the matter and have no objection F to the above proposal since the roads and drains for the whole development will be managed by you. However, in our opinion, the access should be 40ft.

I return herewith a photostat copy of the plan which was duly signed for your retention. G

Sekian, terima kasih.
'Berkhidmat Untuk Negara — Cintailah Bahasa Kita.'
Saya yang menurut perintah,
tt
(Mohd Ghazali bin Ahmad Nasuruddin) H
Jurutera Jalan
bp Pengarah Kerja Raya
Pulau Pinang.

sk Jurutera Daerah
JKR Pulau Pinang. I

Given the above facts, the defendants have failed to provide a proper access of the sort, or substantially of the sort, contemplated by para 2(e) of my

order dated 7 November 1988, and given the topographical constraints which have now emerged during the present proceedings, but which had not been elicited by the parties at the trial, it would be humanly impossible for the defendants to do so.

But, lest it be forgotten, it was the defendant company itself who had, at the trial, proposed an access road 12ft wide from lot 48 to the public highway known as the Batu Ferringhi Road, as illustrated by the plan (exh D75) it had tendered in evidence and thereby induced the court to make the order concerned. But I was careful to state in my judgment, that if there were some legal or other impediment to the creation of an easement affording a right of access, in particular, a right of carriageway within the meaning of s 288(b) of the Code, of the sort proposed by the defendant company itself, then the parties would be at liberty to apply to court to enable me to consider what further or other orders I should make in substitution for or in addition to the orders aforesaid, in which event, perhaps the damages awarded for diminution in value of lot 48 may have to be reassessed, having regard to the circumstances of the case. It therefore ill lies in the mouth of counsel for the defendant company to submit, as he has submitted: 'Was there in the first place the topographical and geographical possibility of having a 12ft wide access to lot 48?' If that is the stance adopted by the defendant company, they should never in the first place have proposed such an access at the trial.

The next point to consider is whether an access road 6.6ft wide such as that now provided by the defendant company prevents the land from being landlocked.

I would say that technically, it would not be landlocked but for all practical purposes it should be treated as though it were landlocked. Indeed, counsel for the defendant company had on 11 September 1991, when asked by the court: 'So are you saying that the access proposed in exh D75 for lot 48 would not be feasible because of failure to provide for drain reserve and so lot 48 would be landlocked?', had replied: 'Yes, but the relevant authority has the discretion to allow the present access provided by defendants after order of Supreme Court giving them three months to do so.'

There was no evidence before me that the defendant company had applied to the relevant authority to exercise the discretion spoken of by counsel (assuming the matter in issue was within its jurisdiction and so it had the discretion concerned).

Moreover, some 11 years have elapsed since the defendants first committed their acts of trespass and nuisance against lot 48, nearly three years have elapsed since my judgment dated 7 November 1988 was delivered, and another two years have elapsed since the order of the Supreme Court dated 1 August 1990, and yet the position as regards access from lot 48 to the public highway known as the Batu Ferringhi Road remains, substantially speaking, the same. Of what use is an access road 6.6ft wide for motorcars or heavy motor vehicles such as lorries. A Mercedes Benz 280 would probably be just over 6ft wide. The access road now provided for lot 48 is obviously hazardous and might even be considered a trap especially

for drivers of motor vehicles not familiar with the structural and topographical risks inherent in it, even in broad daylight. The drop on the left as one proceeds along the access road to lot 48 is a considerable one varying between 9.6ft to 13ft and the stability of the access road given the fact that part of it is constructed over the top of the retaining wall between lots 524 and 42 and over the drain reserve, contrary to the express requirements of the defendant company's final sub-division plan, leaves much to be desired, to say the least.

After having given careful consideration to the submissions of counsel on both sides, I am satisfied that it would be both right and fair to re-assess the compensatory damages awarded for diminution in value to lot 48 as well as the exemplary damages awarded, and substitute awards under these heads for the orders made under paras 2(a), (b), and (d) appearing in the summary of the reliefs enumerated in my judgment (at p 245 col 2).

I must, first of all, refer to the basis upon which I had assessed general damages for diminution in value to lot 48, in my judgment dated 7 November 1988.

I had then found, contrary to the testimony of the plaintiff's expert Mr K Parampathy, that lot 48 was not landlocked and sterile for all development purposes. I had then gone on to make a finding that *whereas* lot 48 had previously enjoyed access by way of the existing road mentioned in cl 11 of the sale and purchase agreement which had two branches leading to lot 48 whose combined width was 30ft, it would probably have a 12ft or so wide access road which the defendant company had said it would provide in accordance with their plan exh D75 and in respect of which I had made orders analogous to specific performance but subject to various conditions, and that this would be suitable to cater for the needs of a dwelling house (at pp 225 col 2I to 226 col 1A). I had then added: 'To that extent, I find that lot 48 has suffered diminution in value.'

I had also rejected Mr Parampathy's evidence in so far as he had assumed that lot 48 could be developed to a density of some 30 residential units to an acre for the reasons appearing in my judgment (at p 225 col 2A and E–G). I had then gone further and found that I was satisfied that the plaintiffs never had any serious or genuine intention of developing lot 48 let alone to a density of 30 units to an acre and I drew attention to the fact that the first and second plaintiffs had long before the events which gave rise to this suit, emigrated to Perth, Australia (at p 226 col 1D). I next posed the question:

> Having regard to the matters aforesaid, I had then asked myself: 'But, what is the measure of damages which the court should award in an unusual case, such as the present, where specific performance of cl 11 of the sale and purchase agreement or, in effect, a mandatory injunction to pull down the three houses which stand on the right of way leading to lot 48 envisaged by that clause, thus preventing the continuance of the trepass, must be refused on grounds of hardship to third parties although a modified form of order analogous to specific performance hereinbefore particularized has been granted?'

I then referred to two cases — *Bracewell v Appleby*[2] and *Carr-Saunders v Dick McNeil Associates & Ors*[3] — which I considered shed some light on the problem which confronted me (at p 226 col 2C).

This is how I put it (at p 227 col 1D):

> There seems no reason in principle why the beneficiary of a positive convenant such as cl 11 of the sale and purchase agreement who cannot obtain specific performance for the grant of a right of way as envisaged in the 1935 survey plan (p 49AB) *but* who has obtained a modified form of an order analogous to specific performance as in the present case, should not be entitled to damages assessed on the basis of the amount the defendant company would have been prepared to pay to gain substantial release from the obligation of performing the convenant. If such a measure is available to the beneficiary of a restrictive covenant to whom an injunction has not been granted (as in *Wrotham Park Estates Co v Parkside Homes* [1974] 1 WLR 798, it should also be available to the beneficiary of a positive covenant who cannot obtain specific performance as aforesaid.

I next referred to the fact that there was no satisfactory evidence before me of the amount of profit the defendant company would have made from the sale of the three link houses each at a price of about RM280,000 which stand on the right of way leading to lot 48 — a situation not unlike that in the *Carr-Saunders* case.[3]

I noted, however, that there was evidence of general loss of amenity caused to lot 48, by reason of the fact that instead of an access consisting of two branches with a combined width of 39ft, the plaintiffs would have to be content with a single access about 12ft wide offered by the defendant company as evidenced by exh D75 (at p 227 col 1F and G).

I then stated my approach to the problem of the assessment of damages to be 'on the basis that damages are awarded in lieu of a mandatory injunction to pull down the three houses and not merely as compensation for the loss of the actual legal right of way contemplated by cl 11' (at p 227 col 1G and H).

I next referred, with approval, to the following passage in the judgment of Millett J in the *Carr-Saunders* case[3] at p 896 G–H:

> ... it seems to me obvious that any dominant owner, negotiating with a servient owner for monetary compensation for the loss of light, would take into account the general loss of amenity which his premises would suffer. To that extent, it seems to me that the court is entitled to approach the question on the basis that damages are awarded in lieu of an injunction and not merely in compensation for the loss of the actual legal right. If a mandatory injunction had been granted, the building would have been pulled down and the plaintiff would have been restored not only to his direct light, but also to sky visibility, a pleasant view of brickwork and a sloping roof, sunlight and so on.
>
> I have little evidence to guide me, except that £3,000 or thereabouts must be the absolute minimum figure. Doing the best I can and taking account, I hope, of all the considerations that have been pressed upon me by both sides, of the evidence I have heard and, indeed, of my own view, I award general damages of £8,000.

I then concluded (at p 227 col 2E) as follows: A

> I would award the plaintiffs RM100,000 by way of general damages for diminution in value of lot 48; in particular, for loss of amenity, namely, that instead of an access consisting of two branches with a combined width of 30ft envisaged in cl 11 of the sale and purchase agreement, they will have to be content with a single access of about 12ft wide offered by the defendant company at the hearing B as evidenced by the plan exh D75.

The position today, however, is — and I have so found — that although technically lot 48 is not landlocked, for all practical purposes it should be treated as though it were landlocked, for the reasons hereinbefore mentioned. Accordingly, the basis upon which I had made my award of damages for diminution in value of lot 48 has gone and so I can derive no C assistance from the cases of *Bracewell v Appleby*[2] and *Carr-Saunders*.[3] I must therefore reconsider that issue by way of a fresh approach.

In the present proceedings Mr Parampathy was again called by the plaintiffs.

In adopting a fresh approach, I consider that I must fall back on the D broad fundamental pinciples as to damages enunciated by Lord Blackburn 112 years ago in *Livingstone v Rawyards Coal Co*[4] who said that the measure of damages is:

> that sum of money which will put the party who has suffered, in the same position he would have been if he had not sustained the wrong for which he is E now getting the compensation or reparation.

I consider that the finding in my judgment dated 7 November 1988 (at p 226 col 1C and D) that the plaintiffs never had any serious or genuine intention of developing lot 48 let alone to a density of 30 units to an acre still applies having regard to the evidence. F

I would therefore assess compensatory damages for diminution in value to lot 48 by first of all taking its present fair maket value had it not been injured by the acts of trespass and nuisance of the defendants and subtracting from that its present fair market value; in other words, in the state it now is. G

In *Kailas Chandra v Secretary of State*,[5] Jenkins CJ said:

> The market value of land may be roughly described as the price that an owner willing, and not obliged to sell might reasonably expect to obtain from a willing purchaser with whom he was bargaining for the sale and purchase of the land.

I consider that the safest guide to determine the fair market value is H evidence of sales of similar land in the neighbourhood, due allowances having been made for all relevant circumstances.

I shall now refer to the pertinent parts of Mr Parampathy's testimony.

He stated that a result of a search he had made at the Registry of Titles, Penang, as to recent sales of lands in the neighbourhood of lots 48 and 55, I had revealed transactions, the subject matter of which were lots 40, 46, 47, 49 and 50, Section 2, Town of Batu Ferringhi, NED, Penang. He then referred to certified copies of the relevant memoranda of transfer showing

A the areas of these neighbouring lots, the prices paid for them and the dates of the sales.

On the question whether the neighbouring lots bore comparison to lots 48 and 55, he had the following observations to make:

> There is a bungalow on lot 47 and an outhouse on lot 40 whereas on lot 46 there
B are two (2) pre-war houses. Lot 50 is a vacant plot. Except for lots 40 and 47 which were transacted at RM1,202,679 and RM1,397,321 respectively equivalent to approximately RM57psf, all lots were transacted on the average at approximately between RM25–RM26psf. It is to be noted that all the said lots, namely, lots 40, 47, 46, 49 and 50 are all subject to road widening. The portion of each of the said lots to be surrendered is quite substantial as the affected
C portion for *road widening represents some 20–25%* of the land area of each lot.
>
> Current market conditions although favourable have yet to show the price levels for development properties during the period 1983–1984. The rates at RM25–RM26psf on the average for the lots in question may be *fair* considering that the development potential of the said lots is *limited* having regard to the constraint on road *widening and the building line* which takes another 10% of the
D land area. The *market value* for the nett developable area which measures approximately 75% of the land area would work out to some RM34–RM35psf.
>
> Lots 48 and 55 are not subject to any road widening and without this constraint, both lots, which in addition command a panoramic view of the sea and are markedly *superior in terms of access and location*, should under current market conditions fetch a rate of *no less than RM42psf.*

E

Far from destroying this part of Mr Parampathy's evidence, the defendants[2] own expert DW10 had testified as to the sale of five plots of land situated approximately 200–300ft across the Batu Ferringhi Road from lots 48 and 55; particulars as to the date of sale, the price, the area and location appearing sufficiently from the certified copy of the memorandum of trans-
F fer, exh D81, which went to support Mr Parampathy's opinion as regards this part of the plaintiffs' claim.

Commenting on this aspect of DW10's testimony, Mr Parampathy said this:

> Subsequent to my evidence in court it had been brought to my knowledge that
G the defendants' witness DW10 had given evidence on the sale of five (5) pieces of land situated approximately 200–300ft across the Batu Ferringhi Road from lots 48 and 55 at a total purchase consideration of RM3,959,000 equivalent to approximately RM75.70psf as confirmed by the memorandum of transfer (D81) and as set out in the table (D81A). It is significant that according to table (D81A) the land held under HS(D) No 2 for a leasehold term of 80 years zoned
H for tourist industry was sold at approximately RM67.43psf.
>
> I did not have the benefit of the evidence on the sale of the five pieces of land at the hearing and wish to say that the stamp office valuation of the said five pieces of land reflect very favourably on my valuation of lots 48 and 55 at RM48psf considering that the said five pieces of land are narrow and are of uneven terrain although enjoying a beach frontage. Both lots 48 and 55 enjoy
I however a panoramic view of the sea.
>
> I had in my valuation report assessed damages for lot 48 on the basis that the said lot was without proper access and had virtually lost its market value for development purposes. Accordingly, I had provided for a sum of RM742,000

being damages for lot 48 (measuring approximately 17,533sq ft) being the difference between the then market value of lot 48 at RM48psf and its residual or nominal value at RM100,000. A

I accept Mr Parampathy's evidence, as to the present fair market value of lot 48, had not the defendants injured it by committing the acts of trespass and nuisance, at not less than RM42psf, as I find nothing improbable in it. B

On this basis, the present fair market value of lot 48, had it not been injured by the defendants' acts of trespass and nuisance, would be RM736,386 (17,533sq ft × RM42).

I also accept Mr Parampathy's evidence that the present fair market value of lot 48 in its present injured state would be its residual or nominal value and that would not exceed RM100,000, as I find nothing improbable C in it.

Accordingly, I would assess general damages for diminution in value of lot 48, at RM636,386 (RM736,386–RM100,000) and I make an award accordingly in substitution for the award of compensatory damages I had made under this head in my judgment dated 7 November 1988. D

Looking back, I would add, that I had not overlooked the evidence called in support of the defendant company's case, namely, the testimony of the defendant company's property maintenance officer, Ng Heong Goon, (DW11), the land surveyor, Tan Tock Yong (DW12), the executive manager of project planning of the Low Yat Group, Chia Sin Keong (DW13), and the valuer, estate agent and property consultant, Lim Cheng An E (DW14). For reasons which must be self-evident from my conclusions upon the issues which have arisen for decisions and my reasons therefor, I do not consider that such testimony in any way, assists the case of the defendant company.

I would, however, single out for comment the testimony of the valuer F and property consultant Lim Cheng An, and draw attention to the fact that his testimony in no material way contradicted the testimony of Parampathy. Indeed, when asked in the examination-in-chief whether the comparable sales method, and, in particular, reliance by Parampathy on the side of the five lots specified in the appendix to exh P107, would be fair for purposes of determining the fair market value of lots 48 and 55, he replied in the G affirmative.

Claims for exemplary damages in respect of lot 48

I had dealt rather fully with this part of the plaintiffs' claim in my judgment dated 7 November 1988 and I see no reason to depart from anything I had H said there both as regards the law or the facts except on the question of the quantum of the award under this head of damages.

I had, when making the award of exemplary damages at the trial, arrived at the following conclusion: 'In all the circumstances, so far as the claims relating to lot 48 are concerned, I would award the plaintiffs a sum of I RM25,000 by way of exemplary damages against both the defendants which represents a little less than 25% of the compensatory award of RM105,000.'

A Having regard to the fact that I have increased the award of compensatory damages for diminution in value of lot 48, very considerably, from RM105,000 to RM636,386, it is, I consider, just to make a corresponding increase in the award of exemplary damages from RM25,000 to RM155,000 and I so order. In so doing, I adhere to my earlier view that the exemplary damages against both the defendants should represent a little less than 25% B of the award for compensatory damages of RM636,386.

Lot 55

It is not disputed that although there exists a 40ft wide access road on lot C 39 ('the servient land') leading to lot 55 ('the dominant land'), the defendant company have until now failed or omitted to execute the prescribed Form 17A under s 286(1) of the Code and to present the same for registration thus creating an easement of way, in particular, a right of carriageway within the meaning of s 288 (b), in perpetuity, over its 40ft D wide access road and so affording access from lot 55 to the public highway known as the Batu Ferringhi Road in favour of the plaintiffs or their successors in title although they were required to do so by the terms of para 7(a) of my judgment dated 7 November 1988 within one month from date thereof.

The plaintiffs should then have applied to the senior assistant registrar of E the High Court, Penang, to comply with the requirements of para 7(a) because it was also provided therein that failing compliance with such requirements the senior assistant registrar be authorized to do so provided always that this did not have the effect of interfering with the rights of third parties which might have intervened. According to the evidence now before me, there is nothing to suggest that the rights of third parties have inter- F vened.

It will be recalled, that my judgment aforesaid did go on to provide by para 7(c) that, 'in the event of the rights of third parties having intervened or if there is some legal or other impediment to the creation of such an easement, then the parties shall be at liberty to apply to court to enable me G to consider what further or other orders I should make in substitution therefor including, perhaps, an order for the award of damages for diminution in value to lot 55, having regard to the circumstances of the case'.

I have to also point out, that according to the evidence before me, there is nothing to suggest that there is any legal or other impediment to the creation of the easement aforesaid and I would have expected that had there H been anything of the sort the defendants would have been the first ones to have pointed that out lest they be cited for contempt of court.

Be that as it may, my attention has been directed by counsel for the plaintiffs to the following facts:

I (1) the existing access as it stands was not constructed with the intention of serving lot 55 and hence, the defendants' layout plan (D94) shows a 'cul-de-sac' and the final sub-division plan ('B') shows a drain reserve at the boundary of lots 55/39; and

(2) that though as far back as 1984 the JKR had pointed out (D103) that the levels of the road as constructed were not in accordance with the standard of the JKR and that in any case 'being a *condominum housing scheme the roads would be maintained as private roads'* nothing to date had been done by the defendants either to comply with the requirements of the JKR for take-over or to have the status of the road determined for the purpose of compliance with the said order of court.

Fact (1) above will not, per se, in any way prevent the creation of the easement envisaged by para 7(a) of my judgment as once Form 17A prescribed under s 286(1) of the Code is registered, there will arise a right in rem in favour of the plaintiffs and their successors in title maintainable against the whole world and which will override the defendants layout plan (D94) and their final sub-division plan (B). It will then matter not one whit that the existing access road was not constructed to cater for the needs of lot 55 or that the final sub-division plan shows a drain reserve at the boundary of lot 55 and lot 39.

Fact (2) indicates clearly that the existing access road concerned is a private road (or more accurately, a private street: see s 3 Street, Drainage and Building Act 1974) and this is precisely why it would be possible, subject to there being no legal or other impediment, to create the easement aforesaid.

Looking back, I see no reason to depart from the reliefs I had decreed in so far as lot 55 is concerned (except as regards the award of exemplary damages, which I shall deal with anon).

In making the orders for the grant of an easement of way, I had relied on the following matters:

(1) by cl 11 of the sale and purchase agreement, the defendant company had agreed that the lands concerned were sold to it subject to the right of way;
(2) the defendant company knew perfectly well that the plaintiffs would *not* have sold but for the agreement to provide a right of way;
(3) it had been orally agreed by the defendant company to grant to the plaintiffs the right of way; and
(4) the defendant company was estopped by its conduct and the conduct of its managing director from denying the plaintiffs a right of access from lots 48 and 55 to the public highway known as the Batu Ferringhi Road.

It follows that all the four requirements for the creation of an easement of way are satisfied and these are:

(1) there must be dominant and servient lands;
(2) the easement must accommodate the dominant land;
(3) the dominant and servient land-owners must be different persons; and
(4) the right granted must be capable of forming the subject matter of a grant.

I recognize that the effect of s 284 of the Code is that an easement can only be created by express grant followed by registration of an instrument in Form 17A or Form B prescribed by s 286(1), as the case may be. But, s 206(3) of the Code contains an express provision which states that the provisions of the Code requiring dealings to be effected in the statutorily prescribed manner shall 'not affect the contractual operation of *any transaction* relating to alienated land or any interest therein'. (Emphasis added.)

In *Yong Tong Hong v Siew Soon Wah & Ors*,[6] by resort to the doctrine of equitable estoppel and in the name of construction, although the agreement was not a proper instrument for registration as a lease, yet the Federal Court treated it as an agreement for a lease and entitling the appellant to a lease for 30 years under s 221(3)(b) of the Code. As Ong CJ put it at p 108, 'The validity of contracts relating to alienated land or *any interest therein* is explicitly declared in s 206(3) of the National Land Code'. (Emphasis added.)

This provides statutory authority for the liberal application of equity whenever there is a basis for that as the following cases will serve to reinforce.

In *Mercantile Bank Ltd v The Official Assignee of the Property of How Han Teh*,[7] Raja Azlan Shah J (as His Majesty then was) had occasion to issue the reminder that 'independent of our land legislation our courts have always recognized equitable and contractual interests in land. See *Loke Yew v Port Swettenham Rubber Co* [1913] AC 491. See also s 206(3) of the Code.'

In *Inter-Continental Mining Co Sdn Bhd v Societe Des Etains De Bayas Tudjuh*,[8] the agreement between the parties was in substance a sublease of mining land though not in statutory form, and was treated as effective as an agreement to enter into a sublease to which s 206(3) of the Code applied, and equity would specifically enforce it.

In *Margaret Chua v Ho Swee Kiew & Ors*,[9] the Federation Court of Appeal had to consider the legal effect of an agreement in writing which was incapable of registration as a lease. It was thus incapable of conferring upon the purported lessees any real interest in the land and so as a lease it was a nullity. Thomson CJ speaking for the court considered (at p 175 col 2A and B) 'that although the agreement might be a nullity as a lease, it could be, and indeed was, a good enforceable agreement for a lease under which the appellant as registered proprietor had undertaken the obligation to grant a lease.'

A far better case on the point, than those thus far cited, is the New Zealand case of *Mayor of Wellington v Public Trustee*.[10]

In order to create an easement over land, the New Zealand Land Transfer Act 1885, by s 76, requires that a memorandum of transfer in Form C in the second schedule is to be executed and registered.

Clearly, therefore, in New Zealand, just as in our country, no easement affecting land under the Act can in law be created except in the manner provided by the Act.

In *Mayor of Wellington v Public Trustee*,[10] it was held in the court below that an equitable easement had been created by the agreement in question

in favour of the plaintiff, but it conferred no right to have the agreement specifically performed by the grant of a legal easement in lieu thereof, and that if the plaintiff had desired to obtain a legal easement by grant under the Land Transfer Act, express provision for that purpose should have been inserted in the agreement. The opinion was further expressed that the only remedies of the plaintiff under the agreement are: (i) an action for damages against the other party; and (ii) an action for an injunction against the other party or against any assignee acquiring land with notice of the agreement.

On appeal to the Court of Appeal, it was held, allowing the plaintiff's appeal, that the agreement for an easement having been made for valuable consideration, was one in respect of which the court had jurisdiction to grant specific performance, and an order may be made for the execution of a formal registrable instrument evidencing the rights conferred by the agreement.

Hosking J speaking for the court said, inter alia, this (at p 1099):

> Now, as the document in question is not registered it does not create, and as it is not in registrable form it is not available to create, anything more than what may be termed an equitable interest, as distinguished from the protected proprietary interest which would be conferred by registration of an instrument in proper form creating the easement. Then, has the court jurisdiction to grant the relief sought by the appellant — namely, an order that the public trustee as the executor of the deceased shall executed a registrable instrument evidencing the right? We think there is jurisdiction on the ground that the deceased and the corporation agreed for valuable consideration that there should be a grant, which fails merely for want of form. This basis of equitable relief is illustrated by *Parker v Taswell* 2 De G & J 559.

I might as well add that I do not consider that the case of *United Malayan Banking Corp Bhd & Anor v Pemungut Hasil Tanah Kota Tinggi*[11] presents an obstacle to paras 7 and 8 of the orders I had made. That case was not concerned with equitable principles applicable to a vendor-purchaser situation but with the question of whether those equitable rules of English law which have to do with relief against forfeiture have any application to forfeiture of alienated land for non-payment of quit rent to the state authority duly brought about under the Code. The Privy Council answered this question in the negative because the relevant provisions of the Code evince an intention that the English rules of equity relating to relief against forfeiture should not be available to proprietors of alienated land.

In the present case, we are not concerned with the problem of relief against forfeiture for non-payment of quit rent to the state authority but with s 206(3) of the Code which does expressly provide that the provisions of the Code requiring dealings to be effected in the statutorily prescribed manner shall 'not affect the contractual operation of any transaction relating to alienated land or any interest therein'.

Claim for exemplary damages in respect of lot 55

In my judgment dated 7 November 1988, I had indicated why I considered the damages under this head should be twice as much as I had awarded

under the corresponding head in respect of lot 48. I have no reason to depart from the reasoning which lead me to that conclusion. It follows, therefore, that having increased the award under this head from RM25,000 to RM155,000 in respect of lot 48, I must make a corresponding increase in the award under this head, that is to say, from RM50,000 to RM310,000 in respect of lot 55 and I so order.

The defendants must pay to the plaintiffs the costs of these proceedings to be taxed on the higher scale.

Order accordingly.

Reported by ALG Teh